(1969) 03 GAU CK 0003

Gauhati High Court

Case No: Income-tax Reference No. 1 of 1968

Commissioner of Income Tax		APPELLANT
	Vs	
Tezpur Automobiles		RESPONDENT

Date of Decision: March 6, 1969

Acts Referred:

- Income Tax Act, 1922 - Section 28
- Income Tax Act, 1961 - Section 271, 271(1), 297(2)

Citation: AIR 1969 Guw 122 : (1970) 75 ITR 722

Hon'ble Judges: S.K. Dutta, C.J; K.C. Sen, J

Bench: Division Bench

Advocate: J.B.Bhattacharjee, for the Appellant; S.M. Lahiri, S.K. Sen and R.P. Agarwalla, for the Respondent

Judgement

Sen, J.
In this reference u/s 256(1) of the Income Tax Act, 1961 hereinafter called the Act, the following question has been posed for our answer.

"Whether, on the facts and circumstances of the case, the Tribunal was right in holding that no penalty u/s 271(1) of the Income Tax Act, 1961, can be levied in respect of any assessment for the assessment year 1961-62 or earlier year which is completed on or after 1st April, 1962, in spite of the provisions of Section 297(2)(g) of the Income Tax Act, 1961 ?"

2. It appears from the statement of the case that a penalty of Rs. 10,600 had been imposed by the Inspecting Assistant Commissioner of Income Tax u/s 271(1)(c) read with Section 274(2) ot the Income Tax Act, 1961, for alleged concealment of income of Rs. 4,500 only. This penalty proceeding was started in connection with the assessment for the year 1961-62. For this year the assessee filed on January 29, 1962, a return of its total income u/s 22 of the Income Tax Act, 1922 (hereinafter called " the old Act "), admitting Rs. 17,289. But after scrutiny of the accounts, the

Income Tax Officer added back Rs. 35,532 out of the expenses account and he also made an estimated addition of Rs. 41,407 in tyres and tubes account. Further, the Income Tax Officer added certain cash credits aggregating to Rs. 8,500 in the account of third parties alleged to be loans as the assessee''s income from undisclosed sources. He completed the assessment u/s 23(3) of the Income Tax Act, 1922, long after March 31, 1962. On appeal before the Appellate Assistant Commissioner the addition of Rs. 41,407 to the trading account was reduced to Rs. 10,000 and further retained a sum of Rs 4,500 out of the cash credits found in the assessee''s books adopting the peak credit, i.e., accepting those credits which were covered by sufficient prior withdrawals. The penalty proceedings in question were initially started by the Income Tax Officer in respect of the addition as income from undisclosed sources, but since the amount of the penalty was likely to exceed Rs. 1,000 he referred the matter to the Inspecting Assistant Commissioner, who by his order dated February 29, 1966, levied the impugned penalty with the remark that in law the quantum of penalty imposable has to be calculated with reference to the income admitted in the return and the income ultimately assessed and as such the quantum of the penalty may have nothing to do with the quantum of actual concealed income. It appears from the order of the Inspecting Assistant Commissioner of Income Tax that he imposed a penalty of Rs. 10,600 for concealment of income for the assessment year 1961-62.

3. Against the order of the Inspecting Assistant Commissioner of Income Tax aforesaid an appeal was taken to the Income Tax Tribunal. In appeal, a preliminary objection was raised to the effect that, since the relevant assessment in the present case has been completed under the Income Tax Act of 1922, the alleged offence of concealment of income or of deliberately furnishing inaccurate particulars of such income, if at all, had been committed u/s 28(1)(c) of the Act of 1922, and it was accordingly incompetent on the part of the Inspecting Assistant Commissioner to have imposed the penalty in question u/s 271(1)(c) of the Act. It appears that there are divergent decisions on the point whether the return for the assessment year 1961-62, which was filed on January 29, 1962, before the Act came into operation and the assessment was completed u/s 23(3) of the old Act, the provisions of Section 271(1)(c) of the Act can be invoked. The assessee''s contention is that, even assuming that there was an offence of concealment of income or of furnishing inaccurate particulars of such income, the proceeding should come within the purview of Section 28(1) of the old Act, and, therefore, it was incompetent on the part of the Inspecting Assistant Commissioner of Income Tax to invoke the provisions of Section 271 of the Act for imposition of the impugned penalty.

4. In such state of affairs the Tribunal was of opinion that the contention of the assessee was correct and in support of its order it has relied upon the decisions of the Mysore High Court in the case of S.C. Magavi, Haveri Vs. Commissioner of Income Tax, Mysore, and of the Bombay High Court in the case of MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR and

ANOTHER., As pointed out by the Tribunal, there are decisions to the contrary as reported in the case of KISHANLAL Vs. COMMISSIONER OF Income Tax, M. P., in which it has been held that the assessee is liable to penalty u/s 271(1) of the Act of 1961 for defaults referred to in Section 28(1) of the old Act in respect of the assessment for the year ending on March 31, 1962.

5. The Act came into operation on April 1, 1962, and in view of the conflicting decisions we shall have to refer to, in the first instance, the relevant section of the Act under which the penalty proceedings may be drawn up.

6. It is an undisputed fact that the penalty proceedings were started after the coming into operation of the Act, in respect of the alleged concealed income referred to in Section 271(1)(c) of the Act and that the alleged offence of concealment of income or of deliberately furnishing of inaccurate particulars of such income was committed in respect of assessment proceedings which were started during the operation of the old Act, but completed after the new Act had come into force.

7. In the above circumstances, it is for us to consider whether the Income Tax Officer was justified in taking resort to the provisions of Section 271 of the Act. It is argued, on behalf of the assessee, by Mr. Lahiri that such an action is fraught with illegality, inasmuch as since the proceedings were initiated under the old Act, the penalty proceedings ought also to have been embarked upon u/s 28 of that Act. Mr. Lahiri also lays stress upon the provisions of Section 297(2)(g) of the Act and says that, in the case falling within that section, proceedings u/s 271(1) of the Act may be initiated and penalty may be imposed under the new Act, but that can only be done if the conditions requisite for the applicability of Section 271(1) are fulfilled. One condition, according to him, requisite for applicability of Section 271(1) is that the Income Tax Officer must be satisfied about the concealment on the part of the assessee in the course of the proceedings under this Act. As the satisfaction of the Income Tax Officer in the instant case, according to him, was based upon the material in connection with the assessment proceedings under the old Act, the provision of Section 271(1) could not be attracted. On the other hand, it is argued by Mr. J.P. Bhatta-charjee on behalf of the department that the Income Tax Officer rightly invoked the provisions of Section 271(1) of the Act for defaults referred to in Sub-section 28(1) of the old Act, in respect of any assessment for the year ending on March 31, 1961, or any earlier year which is completed on or after 1st April, 1962, as in the instant case.

8. Both the learned counsel have referred to us a large number of decisions which are in conflict with each other and, therefore, we have to carefully consider as to whether the contention of the department in this reference is based on sound reasons or not. The position, in which we are placed, is undoubtedly intriguing in view of the conflicting decisions and it will accordingly be our best endeavour to record a finding of our own.

9. In the first place we may refer to the relevant provisions of the old Act as also of the new Act for a comparative study.

[Their Lordships referred to Section 28 of the old Act and Section 271 of the Act of 1961 and proceeded :]

10. By referring to the above two sections the most important thing, which arises for consideration, is whether the provisions of Section 297(2)(g) of the Act may be called in aid of the department. Mr. Lahiri''s contention is that, by virtue of the provisions of Section 297(2)(a) of the Act, the penalty proceedings ought to have been started under the provisions of Section 28(1) of the old Act, as it specifically provides for such action being taken. Subsection (2)(a) runs as follows :---

"Where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed."

11. It is, therefore, urged by Mr. Lahiri that, when once the assessment proceedings were started under the old Act, irrespective of the dates of completion, the penalty proceedings ought to have been continued under that Act. Clauses (f) and (g) of Sub-section (2) of Section 297, respectively, run as follows :

" (f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed ;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act."

12. On a plain reading of the above clauses it appears that Clause (f) provides that the penalty proceedings should be continued under the old Act, in respect of assessment completed before the 1st day of April, 1962, the date when the Act had come into operation, and Clause (g) can be attracted in cases where assessment proceedings were completed after the new Act came into force.

13. We should first of all deal with this contention of Mr. Lahiri before proceeding further as to the merits on the points of law as urged by respective learned counsel.

14. In support of this contention Mr. Lahiri has referred us to the Supreme Court decision in C.A. Abraham v. Income Tax Officer, Kottayam, [1964] 41 ITR 425 (S.C.). Their Lordships decided, inter alia, as follows :

" The Income Tax Act (old Act) provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax authorities, and a person who is aggrieved by an order of the Appellate Assistant commissioner imposing a penalty, cannot be permitted to

abandon resort to that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he has adequate remedy open to him by way of appeal to the Tribunal."

15. It is important to note that their Lordships were of opinion that the old Act provided for complete machinery for assessment of tax and imposition of penalty and, therefore, the penalty proceedings should be treated as continuation thereof. On this, Mr. Lahiri contends that only Section 297(2)(a) should be attracted to the instant case. It will not be out of place to mention that their Lordships were also of the view that, under the provisions of the old Act, penalty is additional tax. Under the scheme of the old Act both the assessment and penalty proceedings have been dealt with in one chapter, viz., Chapter IV which provides for "Deduction and Assessment" and the penalty proceedings must necessarily follow assessment proceedings. This chapter covers Sections 18 to 39 and it seems that the penal clauses are also incorporated within the meaning of assessment and as such the question arises--whether this decision will, on all fours, apply to the instant case, where the assessment proceeding has been completed after the coming into operation of the new Act. It will be clear from the scheme of the Act that the penal provisions have been separated from the provision of "assessment and deduction" and Chapter 21 has been introduced on the subject "Penalties Imposable." This shows that the penal provision under the new Act forms a distinct class having a different entity from "assessment" and therefore we are of the view that Abraham''s decision, as stated before, will have no application in this case.

16. In this connection, however, Mr. Lahiri has referred us to the Supreme Court decision in Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others, (S.C.). In this decision, it appears that their Lordships considered a case where assessment was made on 7th February, 1961, for the assessment years 1952-53 to 1960-61 under the Income Tax Act, 1922, and on January 24, 1963, after the repeal of the old Act the Commissioner had issued a notice u/s 33B of the old Act to revise those assessments. On this fact, their Lordships held that the Commissioner had jurisdiction to issue the notices u/s 33B of the old Act, in view of Section 297(2) of the Act. Their Lordships further held that Section 297(2)(a) of the Income Tax Act, 1961, includes within its scope a proceeding u/s 33B of the Indian Income Tax Act, 1922, dealing with "Revision" by the Commissioner and not penalty as provided for in Section 28. Accordingly their Lordships thought that, in such circumstances, Section 297(2)(a) of the Act was attracted in the absence of a provision for revision specifically made thereunder. It has also been observed that the word " assessment" can bear a very comprehensive meaning ; it can comprehend the whole procedure for ascertaining and imposing liability upon the taxpayer and there is nothing in the context of Section 297 of the Act, which compels the court to give the expression "procedure for the assessment" a narrow meaning. In this view of the matter their Lordships were of opinion that a notice u/s 33B of the old Act may be given under the provision of Section 297(2)(a) of the new

Act.

17. In our opinion, this decision cannot be relied upon by the respondent as their Lordships'' observation in the said case is that Section 297 is meant to provide as far as possible for all contingencies which may arise out of the repeal of the old Act and Section 6 of the General Clauses Act, 1897 would not apply because Section 297(2) evidences an intention to the contrary. So, we do not consider that when the instant case is attracted by Section 297(2)(g) of the Act providing for a contingency discussed before Clause (a) of Section 297(2) will not apply.

18. We are not called upon here to enter into the question of the vires or otherwise of Section 297(2)(g) of the Act and must interpret this provision according to the well known principles of interpretation of statutes and we are not also called upon to decide in this reference as to whether the new provision u/s 271 of the Act are more stringent than that of Section 28 of the old Act. If, according to our interpretation, Section 297(2)(g) is attracted in this case, there is an end of the matter.

19. In any event, when Mr. Lahiri argues that fiscal statutes should be interpreted in favour of the citizens and that less stringent measures should be adopted, we shall briefly indicate whether Section 271 envisages stricter penal measures than Section 28 of the old Act. We have already quoted both the sections and it appears that Clauses (a), (b) and (c) of Section 28 are substantially similar to Clauses (a), (b) and (c) of Section 271(1) of the Act and in so far as the quantum of penalty is concerned it does not appear that the maximum limit of penalty which may be imposed under the Act to be larger than what was imposable under the old Act.

20. At the next place we shall proceed to discuss the decisions referred to us by Mr. Lahiri in support of his contention. The first case on the point is in S.C. Magavi, Haveri Vs. Commissioner of Income Tax, Mysore, It was decided in this case by their Lordships of the Mysore High Court that :

"No penalty u/s 271 of the Income Tax Act, 1961, can be levied in respect of defaults committed under the Indian Income Tax Act, 1922 ; but for such defaults penalty u/s 28 of the old Act can be levied. Section 297(2)(g) does not apply to a matter to which Section 297(2)(d)(i) refers, but applies only to a case falling u/s 297(2)(d)(ii)."

21. The next case referred to by MISS SAROJ NAYUDU Vs. APPELLATE ASSISTANT COMMISSIONER OF Income Tax, NAGPUR and ANOTHER., This case arose out of a writ petition challenging a notice issued by the Income Tax Officer, u/s 271(1)(c) of the Act. Their Lordships of the Bombay High Court held, inter alia, that:

"There was a difference in the manner of approach to the levy of penalty and in dealing with it, and in the consequences of lapses on the part of the assessee, between the schemes of the Acts of 1922 and 1961, and Section 297(2)(g) of the 1961 Act contravened Article 14 of the Constitution and was invalid to the extent to which it permits proceedings for penalty being initiated or completed under the

provisions of the new Act in the case of assessees who had filed their returns before April 1, 1962, i.e., before the new Act came into force."

22. The next observation is very important, inasmuch as their Lordships have found that:

"The initial condition for initiating proceedings for imposing penalty under the new Act is that the proceedings in respect of which penalty has to be imposed must be one under the new Act itself.

On the wording of Section 271 of the new Act, it is not possible for the income tax Officer to take action thereunder for levy of penalty in the case of assessees who had already filed returns under the 1922 Act and whose cases were pending completion of assessment on the date of coming into force of the Act of 1961.

The departmental authorities could not, therefore, proceed against the petitioners u/s 297(2)(g) read with Section 271 or 274 of the 1961 Act and the impugned orders were liable to be quashed."

23. This is the decision on which Mr. Lahiri clearly relies and to add to this he has also referred us to a decision of the Gujarat High Court in Commissioner of Income Tax v. Hiralal Mohanlal Shah, [1968] 69 ITR 312. It was held by their Lordships of the Gujarat High Court that :

"In the present case, by reason of Section 297(2)(a) the proceeding for assessment of the assessee was, pointed out above, a proceeding under the old Act and it was in the course of that proceeding that the Income Tax Officer was satisfied that the assessee had concealed particulars of income. The condition precedent for the exercise of powers u/s 271(1) was. not satisfied and so the order of penalty was not valid."

24. Two other decisions of the Gujarat High Court on this point were also placed before us. As they follow the principles laid down in the above case they need not be repeated at this place.

25. The ratio of the above decisions are in favour of the assessee-respond-ent and if we follow these decisions then the contention of the department may be negatived. We shall show later on whether it will be necessary for us to deviate from them.

26. Mr. J.P. Bhattacharjee has, with great respect to the said decisions, submitted that on the clear meaning of Section 297(2)(g) of the Act they are distinguishable from the instant case and has, in the first place, referred to us the decision in KISHANLAL Vs. COMMISSIONER OF Income Tax, M. P., The Madhya Pradesh High Court decided that an assessee is liable to penalty u/s 271(1) of the Act of 1961 for defaults referred to in Section 28(1) of the Act of 1922 in respect of any assessment, for the year ending on March 31, 1961, or any earlier year, which is completed on or after April 1, 1962. According to this decision the period of completion of

assessment is the criterion for determining whether any case comes within the ambit of Section 297(2)(g) the Act.

27. In the instant case also it appears, as stated before, that the assessment was completed long after the date on which this Act came into operation, and as such the Income Tax Officer embarked upon the penalty proceedings u/s 271 of the Act. He has also referred us to a decision of the Allahabad High Court reported as Income Tax Officer, A-Ward, Agra v. Firm Madan Mohan Damma Mal, [196S] 70 ITR 293. This decision also supports his content on. We are at the next place required to consider an unreported Supreme Court decision in the case of Third Income Tax Officer, Mangalore Vs. M. Damodar Bhat, (S.C.). One of the facts, as appearing from the judgment is that the assessment proceedings were taken and concluded under the old Act and tax of Rs. 2,947.56 was imposed and demanded. Against this an appeal was preferred to the Appellate Assistant Commissioner. In appeaL the tax liability was reduced to Rs. 485.55. Thereupon, the Income Tax Officer issued a notice to the respondent purporting to be u/s 156 of the new Act. The impugned notice u/s 226(3) was issued nearly two years thereafter on April 23, 1965. The argument on behalf of the respondent was that both the assessment order as well as the appellate order having been made under the old Act, the provisions of Section 226 of the new Act were not applicable. It was also urged by the appellant that the High Court was in error in holding that action u/s 226 of the new Act was possible only in the case of an assessee who was "in default" and that in the case of an assessment under the old Act no notice u/s 156 of the new Act was possible and there was no way of taking advantage of the provisions for recovery and collection of tax contained in Sections 220 to 234 of the new Act. According to their Lordships of the Supreme Court, the argument of the appellant was well-founded and are accepted as correct.

28. In connection with the above facts their Lordships had to consider whether the provisions of Section 297(2)(j) of the new Act were nullified and declared to be of no consequence and their Lordships observed that an interpretation of Section 226(3) of the new Act, which leads to such a startling result should be avoided as it is opposed to all sound principles of interpretation. There is nothing in the language of Section 226(3) of the new Act to warrant the conclusion that the assessee should be in default or should be deemed to be in default before the issue of the notice under that sub-section. It is true that the group of sections from Sections 220 to 232 of the new Act are placed under the heading "Collection and recovery". But in a case falling within Section 297(2)(j) of the new Act, for example, in a proceeding for recovery of tax and penalty imposed under the old Act, it is not required that all the sections of the new Act relating to recovery and collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject, if necessary, with suitable modifications. In other words, the procedure of the new Act will apply to the cases contemplated by Section 297(2)(j) of the new Act mutatis mutandis. Further, it has been held that in respect of matters where

Parliament clearly expressed its intention by incorporating specific provisions, Section 6 of the General Clauses Act will not apply. The trend of this decision clearly points out that each of the provisions of Clauses (a) to (m) of Section 297(2) are self-contained and they have their applicability on their own force untrammelled by any other considerations. In view of this we cannot accept the argument of Mr. Lahiri that the existence of Clause (a) of the aforesaid section renders Clause (g) nugatory.

29. At the next place, we may refer to another decision of the Supreme Court made in T.S. Baliah Vs. T.S. Rengachari, (S.C) as noted in Supreme Court Notes dated January 15, 1969 at page 21. We had the opportunity of looking into the judgment and it appears that the decision of the above case was made with reference to Sections 52 and 53 of the old Act read with Section 177 of the Indian Penal Code. It was for consideration before their Lordships, whether by reason of the repeal of the 1922 Act by the 1961 Act, the prosecution in respect of the prior proceedings under the old Act were not saved and therefore the prosecution u/s 52 of the 1922 Act was not sustainable. Their Lordships found that Section 297 of the Act expressly repeals the 1922 Act. Clause (2) of Section 297 provides that the matters expressly referred to in Clauses (a) to (m) are made notwithstanding; the repeal of the 1922 Act. This is important for the purpose of the instant case. In this connection their Lordships have referred to Section 6 of the General Clauses Act and have observed that the principle of this section is that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act, as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment, the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears in repealing statute. Their Lordships found, inter alia, that in other words, the provisions of Section 6 of the General Clauses Act will apply, even if there is a simultaneous re-enactment, unless a contrary intention can be gathered from the new statute. Having examined the provisions of Clause(2) of Section 297 of the 1961 Act their Lordships were of the opinion that it is not the intention of Parliament to take away the right of instituting prosecution in respect of proceedings which were pending at the commencement of the Act. It is true that there is no express sub-clause in. Section 297 of the 1961 Act which provides for the continuation of such proceedings, but their considered opinion is that Parliament did not intend that in Section 297(2) of the 1961 Act, the provisions of Section 6(e) of the General Clauses Act will apply. They further quoted the decision in the case of Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others, (S.C.) referred to before that Section 6 of the General Clauces Act will not apply in respect of those matters where Parliament had clearly expressed an intention to the contrary by making detailed provisions for similar matters mentioned in that section.

30. Upon consideration of the aforesaid decisions and the points of law involved, we conclude as follows :

(1) When no specific provisions have been made in Sub-section (2) of Section 227 of the Act, the provision of Section 6 of the General Clauses Act may be attracted.

(2) When Section 297(2) is meant to provide as far as possible for all contingencies which may arise out of the repeal of the old Act, Section 6 of the General Clauses Act will not come into play.

(3) Section 297(2) expresses an intention of Parliament regarding the "savings", and none of the provisions appear to be contradictory to the other.

(4) This savings section has to be considered as a whole and it cannot be said that if one of the clauses applies or does not apply, resort cannot be had to the other clauses in the section. According to the maxims of interpretation, the words used therein should be given their natural meaning.

(5) Clauses (f) and (g) of the above section must be treated to have reigned in their own fields and must not be treated as unnecessary, in view of the provisions contained in Clause (a).

(6) Where the question of imposing and calculating penalty for the first time arises after the passing of the new Act, the proceedings should be started according to Clause (g).

(7) The differentiation in Clauses (f) and (g) has been made with reference to 1st April, 1962, when the Act came into operation. . According to Clauses (f) and (g), if assessment has been completed before 1st April, 1962, action for imposing penalty can be taken under the old Act. If assessment is completed on or after the 1st of April, 1962, action for imposing penalty may be taken under the new Act. We feel that such a transitional provision is in consonance with the recognised legislative-practice.

31. In the above premises and having applied the last item to the instant case we hold that the Income Tax authority was perfectly justified in. starting penalty proceedings u/s 271 of the Act.

32. In the result we answer the question, posed before us, in the negative.

33. Each party is directed to bear its own costs in this reference.

S.K. Dutta, C.J.

34. I agree.